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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1307

FRANK GERVATO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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FRANK GERVATO, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on January 26, 1973.

OPINIONS BELOW.

The United States Court of Appeals for the Third Circuit vacated the Order of the District Court sustaining Petitioner's Motion to Suppress Evidence on January 26, 1973, and remanded the case to the United States District Court for the Eastern District of Pennsylvania for further consideration. Although the Opinion of the Court of Appeals has not yet been officially reported, a copy thereof appears in Appendix A, *infra*, pages A1-A11. The United States District Court for the Eastern District of Pennsylvania had granted Petitioner's Motion to Suppress Evi-

dence in an Opinion filed on March 1, 1972. That opinion has been reported at 340 F. Supp. 454 (E. D. Pa. 1972), and a copy appears in Appendix B, *infra*, pages A12-A33.

JURISDICTION.

The Order of the United States Court of Appeals for the Third Circuit vacating the Order of the United States District Court for the Eastern District of Pennsylvania (Appendix A, *infra*, page A1), was entered on January 26, 1973. On February 20, 1973, upon motion of the Petitioner, Mr. Justice William A. Brennan extended the time for the filing of this Petition for Writ of Certiorari to and including March 27, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Where federal agents, through surveillance of defendant's activities, know that he is not in his home and that no one else is present therein, and reasonably expect him to return within a short while, nonetheless forcibly break into his home to execute a search warrant, even though they know there is no danger of destruction or loss of the evidence therein and there are no other exigent circumstances requiring haste, is this an unreasonable search which violates the Fourth Amendment and the Federal Rules of Criminal Procedure?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

Rule 41(d) of the Federal Rules of Criminal Procedure provides:

"Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant."

STATEMENT OF THE CASE.

Legal Proceedings.

On June 11, 1971, on the basis of items seized from Defendant's apartment on March 24, 1971, a warrant for Defendant's arrest was issued, and Defendant surrendered to the Federal authorities.

On July 15, 1971, a two count indictment, No. 71-434, was returned charging Defendant with illegally manufacturing and possessing lysergic acid amide. After pleading not guilty to both counts of said indictment on September 30, 1971, Defendant filed a Motion to Suppress Evidence and Statements and to Return Property.

On February 3, 1972, the Honorable Clarence Newcomer, Judge of the United States District Court for the Eastern District of Pennsylvania, heard testimony on Defendant's Motion. This testimony is summarized below (Page 5, *et seq., infra.*).

On March 1, 1972, Judge Newcomer rendered his Opinion granting Defendant's Motion to Suppress Physical Evidence and Statements.[1] On March 9, 1972, the Government filed a Motion for Reconsideration of Judge Newcomer's Order of March 1, 1972. On March 10, 1972, Judge Newcomer rendered a Memorandum and Order Denying Said Motion for Reconsideration.

On March 10, 1972, the Government filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit, which Appeal was subsequently perfected. On January 26, 1973, the United States Court of Appeals for the Third Circuit vacated the Order of the District Court sustaining Petitioner's Motion to Suppress Evidence and remanded the case for further consideration.

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1. The Court did not pass on other grounds in the Motion questioning the validity and execution of the warrant. See page A13, *infra.*

Summary of Evidence on Pre-Trial Motion to Suppress.

At the hearing before the Honorable Clarence Newcomer on February 3, 1972, in connection with the Motion to Suppress Evidence and Statements and to Return Property, the following testimony was elicited.

In early March, 1971, the Federal Bureau of Narcotics and Dangerous Drugs was advised by the Ventron Chemical Company, Beverly, Massachusetts, that they had received a telephone call from someone who had identified himself as Frank Gervato, of Famous United Meat Products Company, placing an order for two pounds of Lithium Aluminum Hydride. Ventron later received two money orders in payment, bearing the signature "Frank Gervato".

On March 16, 1971, two agents of the government, posing as drivers for United Parcel Service, delivered the lithium aluminum hydride to Famous United Meat Products Company where it was accepted by Frank Gervato. Government agents observed Defendant removing the lithium aluminum hydride from the plant later in the afternoon on the same day and saw him pick up a pound of dry ice at another location and enter his home at 401 Wolf Street. That residence consists of a two-story brick end-of-the-row house with a delicatessen on the first floor front, and the rear portion of the first floor and the second floor are living quarters, and there is a basement. Agents allegedly observed the premises and saw that the materials were not removed from the house during the period of 3:15 P. M. to 9:30 P. M. on March 16, 1971.

Subsequent investigation by the Bureau of Narcotics and Dangerous Drugs revealed that: on or about February 19, 1971, Frank Gervato ordered various chemicals from Fischer Scientific Company, King of Prussia, Pennsylvania; on February 24, 1971, an unidentified male arrived at Fischer to pick up the order, but did not have enough

cash; a few hours later, Fischer received a telephone call from someone who identified himself as Frank Gervato and changed the order which was picked up a few days later by the unidentified male; on or about February 16, 1971, Fischer received a telephone order from someone who identified himself as Frank Gervato, which order was picked up and paid for in cash a few days later.

Between March 16, 1971 and March 23, 1971, the Bureau of Narcotics and Dangerous Drugs conducted an intermittent surveillance of Defendant.

On March 23, 1971, a government agent observed Defendant leave work at 1:40 P. M., proceed to the dry ice storage section of Publicker Corporation at Tasker Street and Delaware Avenue, and saw him leave five minutes later carrying a used Maxwell House coffee can with a plastic top. He observed Defendant drive to his residence.

The agent called an agent of the Bureau of Narcotics and Dangerous Drugs in New York, and learned that some of the chemicals allegedly ordered by Defendant from Fischer Scientific Company and lithium aluminum hydride and dry ice are used in the manufacture of dimethyltryptamine.

On March 24, 1971, Defendant's apartment was placed under surveillance around 12:30 P. M. Defendant left the premises sometime after 1:00 P. M. After the agent in charge of the investigation procured the warrant (around 2:00 P. M.) he proceeded to his office to await the arrival of chemists to assist in the execution of the warrant. The chemists arrived at 4:30 P. M. and the party arrived at the premises to be searched about 6:00 P. M. When they got to the scene, the agent bearing the warrant was informed by his surveillance party by radio that Defendant probably was not home. The agent had reasonably certain knowledge that the premises were unoccupied.

The bearer of the warrant, together with other persons, proceeded to Defendant's door, knocked, and announced his authority and purpose. Expecting no reply,[2] and receiving none, he then broke in the door. Mr. Sokel,[3] the Defendant's landlord and operator of the adjoining delicatessen, was in his store when the door was broken, and responding to the noise, came through the door connecting the delicatessen to Defendant's apartment and met the agents after they had entered.

The warrant was executed during the next three hours, after which the agents left.

After returning home at approximately 9:30 P. M. and finding that his apartment had been searched, Defendant consulted with an attorney, who was advised by agents of the Bureau of Narcotics and Dangerous Drugs that there would be no warrant for his arrest issued until the agency received an analysis of the items seized. On April 2, 1971, accompanied by counsel, Defendant visited the Regional Office of the Bureau of Narcotics and Dangerous Drugs and was interviewed by two agents. He there gave an oral statement concerning virtually every item seized, hoping to avoid arrest through complete cooperation. As already set forth, his hopes were unfulfilled.

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2. The government argued in its motion for reconsideration that the defendant should be bound by Mr. Sokel's testimony that the agents executing the warrant stated they had seen the defendant run into the apartment, and that thus, the agents were not sure whether defendant was at home or not. Judge Newcomer rejected this contention, concluding that Sokel's testimony that the agents' statement is not necessarily a claim that the agents really thought that defendant was home. "It can easily be taken as a mere admission of knowledge of Gervato's absence by the agents, followed by an attempt at excuse which was never even alleged at the hearing." The Court noted that this is not a statement clearly indicating that the agents were not sure whether defendant was home or not, and even if they unequivocally so stated to Mr. Sokel, he concluded that defendant could not possibly be bound to admit the truth of the agents' statement simply because Sokel testified that the statements were made.

3. The transcript spells his name in one place "Sokel" and in most others as "Sokol". See, for example, N. T. 105.

REASONS FOR GRANTING THE WRIT.

This case squarely raises for the first time in this Court the constitutional validity of a practice in the execution of search warrants which is apparently becoming more widespread, but which has not previously been questioned, despite the fact that it constitutes a serious intrusion on the right to privacy. There is no reported case in this Court, and no other decision of any Court of Appeals, which discusses the right of Federal agents in serving a search warrant to break into a person's home even though the agents know that no one is present in the home, and even though they expect the owner to return, and even though there is no danger of destruction or loss of the evidence they seek, or other exigent circumstances requiring the immediate execution of the warrant.

The District Court, after reviewing extensively the history of search warrants, and suggesting that under common law searches of unoccupied premises were completely unauthorized, concluded that: "[A] man's home should not be forcibly entered in his absence to serve a search warrant absent some exigent circumstances which it is up to the government to show, especially in a case such as this where the house was under surveillance and the agents knew before going to the door that no one was home." The Court of Appeals reversed, concluding that neither the Fourth Amendment nor the Federal Rules required the presence of the occupant before the search warrant may be executed.

Both Courts below differed in their interpretation of the history of the development of search warrants in the United States, and particularly in the history of Writs of Assistance. Both Courts reviewed the cases of *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765); *Wilkes v. Wood*,

19 How. St. Tr. 1153 (1763); *Stanford v. Texas*, 379 U. S. 476 (1965); *Boyd v. United States*, 116 U. S. 616 (1874), and many others.

The District Court noted that there are only a small number of cases on the question of searches of unoccupied homes, so that such searches do not appear to be the rule in American jurisdictions, and believed that its decision prohibiting such searches would not overturn established police procedure. It went on to note that:

> "However, the Constitution is not only to protect us from widespread abuses of the past and present, but those that might become widespread in the future also." 340 F. Supp., at 463.

The Court of Appeals disagreed with the District Court's interpretation that *Entick v. Carrington* prohibited the execution of search warrants if no one was on the premises. It also concluded that neither the Supreme Court or any Court of Appeals has ever hinted or suggested that a search warrant should be executed only in the presence of the possessor or occupant of the property searched. It concluded that the Fourth Amendment does not prohibit *per se* searches conducted in the absence of the occupant, and that the requirement of probable cause for issuance of a warrant, and the requirement of specific identification of property to be seized, provides sufficient protection of the individual so as to distinguish such warrants from general warrants. The Court of Appeals went on to conclude that the apparent protection of having the defendant or some other impartial person present at the time of the search was merely an illusory protection, since frequently the defendant would be under arrest, handcuffed, and sometimes removed from the premises before the search is completed. It thus concluded that it is reasonable to permit a search to take place outside the

presence of the defendant or his representative without fear that the search would be converted into a general search.

It is respectfully submitted that this begs the question. If there is a necessity for protection against pilferage and broad general searches, it is not enough to say that the practical solution will not always be successful. Thus, the Court of Appeals appears to be sanctioning a search warrant practice which is certainly to be decried and limited.

It is respectfully submitted further that this issue is one of extreme importance to the proper administration of justice in the execution of search warrants. Although there are no reported Appellate decisions which squarely conflict with the Court of Appeals decision in this case, and which squarely support the District Judge's decision, nonetheless it is suggested that if the Opinion of the Court of Appeals is permitted to stand unchallenged, this will permit the watering down of important constitutional protections against governmental intrusions on privacy embodied in the Fourth Amendment and the Federal Rules.

Unless this Court elects to review this case, and gives guidelines to Courts of Appeals and the District Judges, the conduct of law enforcement officials within the sensitive area of the protection of a citizen's right to privacy in his home will go unchecked and unreviewed by the Courts.

CONCLUSION.

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STANFORD SHMUKLER,
Counsel for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1334.

UNITED STATES OF AMERICA,
Appellant,

v.

FRANK GERVATO,
Appellee.

(D. C. CRIMINAL No. 71-434.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued November 14, 1972.

Before ALDISERT, GIBBONS and HUNTER, *Circuit Judges.*

CARL J. MELONE,
United States Attorney,
JAMES J. TANSEY,
Attorney United States Department of Justice,
Attorneys for Appellant.

STANFORD SHMUKLER, ESQ.,
Of Counsel:
RICHARD P. ABRAHAM, ESQ.,
Attorneys for Appellee.

OPINION OF THE COURT.

(Filed January 26, 1973.)

HUNTER, *Circuit Judge.*

We review in this case the validity of a district court decision that a warrant to search a private dwelling cannot constitutionally be executed in the known absence of the occupant unless exigent circumstances exist. As far as we know, this question has not been decided by either the Supreme Court or any federal court of appeals.

On March 24, 1971, agent Glanz of the Federal Bureau of Narcotics and Dangerous Drugs (BNDD) obtained a warrant authorizing him to search appellee Frank Gervato's apartment in the daytime for Dimethyltryptamine, a controlled dangerous drug, and chemicals and equipment used in its manufacture. About 5:30 p.m., Glanz and two BNDD chemists drove to appellee's apartment which had been under surveillance by BNDD agents since approximately 12:30 p.m. that day. These agents had seen Gervato leave the premises sometime after 1:00 p.m. and not return, and Glanz was so informed by radio when he arrived around 6:00 p.m. Glanz then proceeded to appellee's door, knocked, and announced his official identity and his reason for wanting to enter the apartment. When he received no reply, he knocked again and then forced open the door. Once inside the apartment, Glanz and the other agents were met by the owner of the building and two young men, who had entered through a door connecting the apartment with a delicatessen. Glanz showed the owner a copy of the search warrant and agreed to the owner's request to be present while the apartment was searched. The warrant was then executed with 78 items being seized. The agents departed about 9:00 p.m., leaving behind a copy of the search war-

rant and a list of the items seized. Gervato, who apparently knew nothing about the search, returned home a few minutes later.

On July 15, 1971, a two count indictment was returned charging appellee with illegally manufacturing and possessing lysergic acid amide, in violation of the Federal Food and Drug Act. On November 29, 1971, appellee filed a pretrial motion to suppress the evidence uncovered by the March 24 search. This motion was sustained by the district court on March 1, 1972 on the ground that the known absense of appellee made the search unreasonable and therefore in violation of the Fourth Amendment. *United States v. Gervato*, 340 F. Supp. 454 (E. D. Pa. 1972). Specifically, the district court said that "[a] man's home should not be forcibly entered in his absence to serve a search warrant absent some exigent circumstances which it is up to the government to show, especially in a case such as this where the house was under surveillance and the agents knew before going to the door that no one was home." *Id.* at 463. The government has appealed this decision pursuant to 18 U. S. C. § 3731. We reverse because we do not believe that the Fourth Amendment requires the occupant to be present before his home can be searched under a valid search warrant and because we do not think that the present search was unreasonable.

The Supreme Court has examined on many occasions the history and purposes of the Fourth Amendment. *E.g.*, *Warden v. Hayden*, 387 U. S. 294, 301 (1967); *Stanford v. Texas*, 379 U. S. 476, 481-485 (1965); *Marcus v. Search Warrant*, 367 U. S. 717, 724-729 (1961); *Frank v. Maryland*, 359 U. S. 360, 363-366 (1959); *Boyd v. United States*, 116 U. S. 616, 624-629 (1874). This history shows that the primary purpose of the Amendment was to put an end to the general warrants and writs of assistance under which offi-

cers of the Crown had been empowered to conduct general searches and seizures. James Otis denounced these writs as " 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book' since they placed 'the liberty of every man in the hands of every petty officer.' " The historic occasion of that denunciation, at a famous 1761 debate in Boston, has been characterized as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' " *Boyd v. United States, supra* at 625.

In order to understand the Founding Fathers' perspective on writs of assistance, it is instructive to consider the history of the controversial general warrant in England. As *Stanford v. Texas, supra* at 482-483, points out:

> "What is significant to note is that the history is largely a history of conflict between the Crown and the press. It was in enforcing the laws licensing the publication of literature and, later, in prosecutions for seditious libel that general warrants were systematically used in the sixteenth, seventeenth, and eighteenth centuries. . . . In later years warrants were sometimes more specific in content, but they typically authorized the arrest and search of the premises of all persons connected with the publication of a particular libel, or the arrest and seizure of all the papers of a named person thought to be connected with a libel."

In the Colonies, the hated writs of assistance were also frequently used to search for evidence of crime or of illegally imported goods.

A few years prior to the outbreak of the American Revolution, the use of general warrants to aid in prosecutions for seditious libel was judicially condemned in England in two landmark cases, *Wilkes v. Wood,* 19 How. St. Tr. 1153 (1763) and *Entick v. Carrington,* 19 How. St. Tr. 1029 (1765). In the former case, John Wilkes had boldly denounced the English government in issue No. 45 of the North Briton. By authority of a warrant issued by the Secretary of State, Wilkes was carried away, and his house was then searched and his papers indiscriminately seized. Wilkes sued and obtained a verdict of one thousand pounds against one of the perpetrators of the search and four thousand pounds against the Secretary of State. In his opinion, Lord Camden condemned the "general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall." 19 How. St. Tr. at 1167. However, while Lord Camden was obviously distraught at what he viewed as a "ridiculous warrant against the whole English nation," there is no indication that he believed the warrant could not be executed in Wilkes' absence.

In *Entick v. Carrington, supra,* a warrant based on a charge of seditious libel issued for the arrest of Entick, the author of a publication called Monitor or British Freeholder, and for the seizure of all his papers. The King's messengers executing the warrant ransacked Entick's home for four hours and carted away great quantities of books and papers. In an opinion which the Supreme Court has recognized as a wellspring of the rights now protected by the Fourth Amendment,[1] Lord Camden declared the general

1. *See Stanford v. Texas, supra* at 484, and *Boyd v. United States, supra* at 626-627.

warrant for the seizure of papers contrary to the common law, despite its long history. "This power," he said, "so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which his is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." 19 How. St. Tr. at 1064.

The district court in the present case placed great emphasis on one passage in *Entick* from which it concluded that the common law prohibited the execution of a search warrant if no one was on the premises.[2] Upon examination of that passage in the context of the entire opinion, however, we do not believe that such a conclusion is justified. Lord Camden's concern in both *Wilkes* and *Entick* was with the unrestricted discretion of those who executed the warrants and not with the presence or absence of either plaintiff. Consequently, after reviewing these two cases along with the other authorities cited by the district court, we do not think that the common law prohibited searches in the absence of the occupant at the time the Fourth Amendment was adopted.

Entick and *Wilkes*, when considered with the Supreme Court cases already discussed, show that the search and

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2. The district court refers to a passage in a different version of *Entick v. Carrington*, 95 Eng. Rep. R. 807, 817 (1765). This passage reads:

> "The warrant in our case was an execution in the first instance, without any previous summons, examination, hearing the plaintiff, or proof that he was the author of the supposed libels; a power claimed by no other magistrate whatever (Scroggs C. J. always excepted); it was left to the discretion of these defendants to execute the warrant in the absence or presence of the plaintiff, when he might have no witness present to see what they did; for they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed; there might be nobody to detect them."

seizure provision of the Fourth Amendment was primarily designed to protect against warrantless searches and seizures and those conducted under an indiscriminate general authority. There is no indication that the Founding Fathers were also concerned that the power to search should be dependent on the presence of the occupant.

In light of this history, it is significant to note that neither the Supreme Court nor any court of appeals has ever hinted or suggested, despite many opportunities to do so, that a search warrant should be executed only in the presence of the possessor or occupant of the property searched.[3] *See, e.g., Stoner v. California*, 376 U. S. 483 (1964); *Chapman v. United States*, 365 U. S. 610 (1961); *Agnello v. United States*, 269 U. S. 20 (1925); *Spinelli v. United States*, 382 F. 2d 871 (8th Cir. 1971), *rev'd on other grounds*, 393 U. S. 410 (1969); *United States v. Ravich*, 421 F. 2d 1196 (2d Cir. 1970), *cert. denied*, 400 U. S. 834 (1970); *United States v. Maroney*, 339 F. 2d 710 (3d Cir. 1965).

In addition, Rule 41, F. R. Cr. P. 18 U. S. C., does not provide, among its mandatory requirements, that a search warrant should be executed only in the presence of the occupant. Since this Rule was promulgated by the Supreme Court, it appears likely that the Court did not consider the presence of the occupant to be a common law or constitutional requirement. Rule 41(d) provides in part that an inventory "shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, *if they are present*. . . ." (Emphasis added). This "if" phrase also suggests that

3. If anything, the Supreme Court has indicated in dictum that a search is premissible in the absence of the occupant. *Alderman v. United States*, 394 U. S. 165, 178 (1969). *See also* Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime 80, 97 (1967).

the Court did not believe that the Fourth Amendment requires presence.[4] *Cf. United States v. Scolnick*, 392 F. 2d 320 (3d Cir. 1968), *cert. denied*, 392 U. S. 931 (1968).

Parenthetically, we agree with the district court and appellee that 18 U. S. C. §3109[5] has no bearing on the present case, either as an authorization justifying agent Glanz's conduct or as an authority forbidding that conduct. *United States v. Gervato, supra* at 457. However, when the search is authorized as it was here, then the procedural re-

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4. This position is supported by the American Law Institute Official Draft No. 1, *Model Code of Pre-Arraignment Procedure* (July 15, 1972), Part II, Search and Seizure, §§ 220.3(4) and (6), which provide:

"(4) *Service of Warrant.* In the course of any search or seizure pursuant to the warrant, the executing officer shall read and give a copy of the warrant to the person to be searched, or the person in apparent control of the premises to be searched, as the case may be. The copy shall be read and furnished before undertaking the search or seizure unless the officer has reasonable cause to believe that such action would endanger the successful execution of the warrant with all practicable safety, in which case it shall be read and furnished as soon as is practicable. *If the premises are unoccupied by anyone in apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.* (Emphasis added.)

"(6) *List of Things Seized.* Upon completion of the search, the officer shall make a list of the things seized, and shall deliver a receipt embodying the list to the person from whose possession they are taken, or the person in apparent control of the premises from which they are taken, as the case may be. The list shall be prepared in the presence of the person to whom the receipt is to be delivered. *If the premises are unoccupied by anyone in apparent and responsible control, the executing officer shall, if practicable, secure the presence of one or more apparently credible persons to witness the preparation of the list, and shall leave the receipt suitably affixed to the premises.* (Emphasis added.)

5. 18 U. S. C. § 3109 provides:

"The officer may break open any outer or inner door or window of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

quirements of § 3109, which are directed at avoiding breaches of the peace,[6] must be followed. Those requirements were followed in this case.

Having decided that the Fourth Amendment does not prohibit *per se* searches conducted in the absence of the occupant, we now hold that the present search was reasonable under the circumstances. In order to obtain a search warrant today, the government must show that it has probable cause for its issuance, and the warrant must identify the property to be seized and name or describe the person or place to be searched. Rule 41(c), F. R. Cr. P. 18 U. S. C. This provides an individual with considerably more protection than did the general warrant of the sixteenth, seventeenth and eighteenth centuries which permitted unrestricted searches and seizures. Rule 41(d) also requires that a person be given an inventory of goods seized or that it be left at the place where the property was taken, something which was not necessary with the general warrant.

Despite this, the district court indicated that a search warrant executed in the absence of the occupant constitutes an unreasonable search because there exists the possibility of a general search and "pilferage by officers of the law." It is, of course, true that either or both of these abuses could occur. However, we agree with the government that the requirement for judicial supervision prior to issuance provides adequate protection against the general warrant. Rule 41(c), F. R. Cr. P. 18 U. S. C. With respect to pilferage, Rule 41(c) and 18 U. S. C. § 3105 restrict the execution of search warrants to certain civil officers of the United States.[7] In addition, Rule 41(d) mandates that an inven-

6. *See Miller v. United States*, 357 U. S. 301, 313 (1958); *see also Wong Sun v. United States*, 371 U. S. 474 (1963).

7. Rule 41(c) provides in pertinent part:

"The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any

tory be made of items seized, and it requires that this inventory be made in the presence of the person from whose possession or premises the property was taken *or* in the presence of at least one credible person other than the applicant for the warrant.

In addition to the above considerations, it is unlikely that the presence of the occupant at the beginning of a search would significantly reduce the possibility of pilferage or a general search. Frequently he would be placed under arrest, handcuffed, and sometimes removed from the premises before the search is completed. Even if this does not happen, when the executing party involves several officers, a number of areas can be searched at once making it impossible for the occupant to observe everything that happens. The district court has not suggested that these procedures are impermissible, but only states that the occupant must be present before a search can begin. This requirement will not avoid the possibility of pilferage or a general search, however, since in most instances these abuses could just as easily occur whether or not the occupant is present when the search commences. Consequently, for this reason as well as for those stated in the above paragraph, we reject the district court's finding that the execution of a search warrant in the absence of the occupant significantly increases the likelihood of a general search or pilferage and is therefore unreasonable.

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7. (Cont'd.)

law thereof or to a person so authorized by the President of the United States."

18 U. S. C. § 3105 provides:

"A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

The district court also indicated that a search begun in the absence of the occupant is unreasonable because of the possibility of unnecessary property damage in a broken lock and door. However, we do not believe that this alone is a sufficient detriment to make a search unreasonable where a warrant based on probable cause has been obtained.

There is also a second issue in this case which must be discussed. A few days after the search, a BNDD agent told appellee's attorney that he would like to interview appellee. The attorney agreed, and on April 2, 1971, appellee went to the Philadelphia Regional Office with his attorney. While there, he made an unsigned statement which the district court ordered suppressed as the fruit of an illegal search. Since we have found that the search in this case was constitutional, however, there is no reason to suppress this statement.

For the foregoing reasons, the order of the district court sustaining the motion to suppress evidence will be vacated and the cause remanded for further consideration.

APPENDIX B.

OPINION AND ORDER OF U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

NEWCOMER, District Judge.

This case is before the Court on defendant's Motion to Suppress Evidence.

There is some conflict of testimony as to certain of the facts in this case, which the Court has resolved in its best judgment in the following statement of facts.

On March 23, 1971, agents of the Federal Bureau of Narcotics and Dangerous Drugs (BNDD) obtained a search warrant to search the home of Frank Gervato, for Dimethyltryptamine, a controlled dangerous drug, and chemicals and equipment used in the manufacture thereof. Gervato had been under intensive investigation in the two to three week period immediately preceding the issuance of the warrant, which investigation had involved rather lengthy surveillance of Gervato on at least two occasions and probably more, as well as an investigation into the scope and nature of his employment as a supervisor of various processes at Famous United Meat Products Co. of Philadelphia.

The premises to be searched were placed under surveillance on the day in question, March 23rd, around 12:30 p.m. Gervato left the premises sometime after 1:00 p.m. After the agent in charge of the investigation procured the warrant, at 2:00 p.m., he proceeded to his office to await the arrival of BNDD chemist to assist in executing the warrant. The chemists arrived at 4:30 p.m. and the party left at 5:30 p.m. and arrived at the premises to be searched around 6:00 p.m. When they got to the scene the agent bearing the warrant was informed by his surveillance

party by radio that Gervato probably was not home. The record is silent concerning previous radio contact between the surveillance party and the bearer of the warrant, but it is fair to assume that this is likely, since the agent who got the warrant was the head of the investigation. The surrounding facts are such as to charge the Agent with reasonably certain knowledge that the premises were unoccupied. The bearer of the warrant, together with other persons in the search party, then proceeded to Gervato's door, knocked, and announced his purpose and authority. Expecting no reply, and receiving none, the agent then broke in the door.

An examination of the direct testimony of the agent who made the entry and the testimony of defense witness Sokol leads to the conclusion that Sokol was in his delicatessen when the door was broken, and responding to the noise of the entry, came through the door connecting the delicatessen to defendant's dwelling and met the agents after they had entered. The warrant was then executed and the agents left approximately one-half hour before defendant returned home at about 9:30 p.m.

Defendant has urged several grounds for the suppression of the evidence procured in this search. First, that there was not probable cause to issue the warrant; second, that the warrant was overly broad; third, that the search was overly broad; fourth, that the warrant was a daytime warrant executed in the night; and fifth, that the entry of the officers was in violation of the rights of defendant and rendered the search unreasonable. Because we dispose of the entire matter on the fifth issue, we need not consider the others. We will assume for purposes of this opinion that the warrant was valid and was validly executed as regards the time of day and the scope of the items seized.

At first blush, it would appear that any attack on the validity of the execution of the warrant because of the manner of entry, especially one involving the breaking of a door, would have to be governed in some way by 18 U. S. C. § 3109, which deals with the authority to break doors and windows as follows:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.".

However, for reasons which will be explained at length below, we find that § 3109 has no bearing on the case at bar, either as an authorization justifying the agent's conduct or as an authority forbidding the conduct.

The Espionage Act of 1917 included a section codifying the procedures to be followed in the execution of search warrants, the first such section in a Federal statute, which included, *inter alia*, the two paragraphs which were later codified as 18 U. S. C. § 618 and § 619 and afterwards, in the words of the historical note in U. S. C. A., "consolidated with minor changes in phraseology but without change in substance" and finally codified in 1948 as 18 U. S. C. § 3109. The interpretation of these provisions and their effect was first addressed in United States v. Maresca, 266 F. 713 (S. D. N. Y. 1920) and United States v. Yuck Kee, 281 F. 228 (D. Minn. 1922). The following passage from *Yuck Kee* is most instructive:

> "The question is raised whether the procedural provisions in Title 11 of the Espionage Act are general in nature, applying to all search warrants, or were

intended to be confined to proceedings under the Espionage Act, leaving other search warrants to be governed by the common law."

"On the one hand, attention is called to the fact that when the National Prohibition Act (41 Stat. 305) was passed it was specially provided therein that issuance of search warrants thereunder should be governed by Title 11 of the Espionage Act, and Section 23 of Title 11 (Section 10496¼v) is also referred to as tending to show that the provisions of Title 11 were not intended to have application to search warrants generally. On the other hand, it is pointed out, in the case of United States v. Maresca (D. C.) 266 F. 713, 725, that Title 11 of the Espionage Act was taken almost bodily from the Code of Criminal Procedure of New York (§§ 791-810), and this is quite apparent from a comparison of the two statutes. It is further pointed out, in the same case, that those sections of the New York Code of Criminal Procedure were simply declaratory of the historic common law, citing People ex rel. Robert Simpson Co. v. Kempner, 208 N. Y. 16, 101 N. E. 794, 46 L. R. A., N. S., 970, Ann. Cas. 1914D, 169 . . .. In view of the foregoing, it would seem unnecessary to determine whether the issuance, service, and execution of the search warrant in the case at bar were governed by Title 11 of the Espionage Act, or by the common law. The requirements of both are the same." United States v. Yuck Kee, supra, at 230.

This view has been substantially affirmed by every opinion we have found that has considered the matter. Giles v. United States, 284 F. 208 (1st Cir., 1922); United States v. Lai Chew, 298 F. 652 (N. D. Cal., 1924); Pappas v. Lufkin, 17 F. 2d 988 (D. Mass., 1927). See also Miller

v. United States, 357 U. S. 301, 78 S. Ct. 1190, 2 L. Ed. 2d 1322 (1958).

The subsequent minor revisions and re-codifications have dispelled the early courts' doubts as to the applicability of § 3109 to the execution of all warrants in appropriate situations, but nothing appears to have changed its basic character as a codification of common law, and this status raises some special considerations of statutory construction. The theoretical advantages of reducing certain common law principles to a code are numerous. It is clear, however, that codification is usually selective as a matter of practical necessity and unless it appears as an affirmative fact that a codification is intended to expound all the law to be applied to an area in which codification is undertaken, the adage *inclusio unius est exclusio alterius* has no application, and situations not covered in the codification are left to common law.

The Court has concluded, for reasons to be given shortly, that § 3109 is a codification of common law principles that developed without contemplation [*sic*] the kind of situation before the court. As we will show below, the common law antecedents of § 3109 were never applied or intended to apply to situations where the executing officer served a search warrant at a person's regular abode with actual knowledge that the person was absent therefrom. It follows from this that § 3109 has no bearing on the case and that we cannot rely on a strained definition of the word "refused" to justify such an entry.[1] We must look to the common law and the historical context of the Fourth Amendment guarantee against unreasonable searches and seizures, in order to judge if the agent's

1. This does not mean that silence can never be taken as a refusal of admittance under § 3109. If the authorities are sure that the premises are occupied, for example, there might be numerous situations in which silence could reasonably be deemed such a refusal.

conduct on the facts before us rendered the search "unreasonable".

We will start our discussion of the common law regarding the right of an officer executing a search warrant to go to a man's home knowing it to be unoccupied and then to break the door to serve the warrant, by observing that passages startingly parallel to 18 U. S. C. § 3109 in both content and language may be found in Burn's Justice of the Peace and Parish Officer (first published in 1754) applying, not to the execution of search warrants, but to the execution of arrest warrants (30th Ed., at p. 303). This is not surprising, for the authorization to search premises grew up as an authority ancillary to the power to arrest. The authority to break a door to execute an arrest warrant was first recognized in the 13th Yearbook of Edward the IV at folio 9 (See Judge Prettyman's opinion in Accarino v. United States, 85 U. S. App. D. C. 394, 179 F. 2d 456, at 460 [1949]). The right of a justice of the peace to issue a warrant including the power to search the premises must have been novel in Coke's time, even restricted as it was to stolen goods, however, for we are told by Lord Camden in 1765 "No less a person than my Lord Coke denied its legality. 4 Inst. 176.". Entick v. Carrington, 95 Eng. Rep. R. 807, (1765) quoted in Boyd v. United States, 116 U. S. 616 at 628, 6 S. Ct. 524, 29 L. Ed. 746 (1885).

The next great statement of the common law applicable to this area after Coke is Sir Matthew Hale's History of the Pleas of the Crown written sometime between 1660 and his death in 1676. Hale disagrees with Coke concerning the propriety of warrants granting the power to search, and Chapter XVIII of Vol. 2 described in detail his views on such warrants.

First, it is unclear if Hale contemplated a warrant to search apart from an arrest warrant. He does not say

directly that a search warrant may issue only as part of an arrest warrant, but he does seem to hold that a warrant to search implies a warrant to arrest, for he says "It ought to command, that the goods found, together with the party in whose custody they are found, be brought before some justice of the peace, to the end that upon further examination of the fact the goods and party, in whose custody they are found, may be disposed, as to law shall appertain.". And further ". . . the very having of the goods carries a sufficient ground prima facie of suspicion, that he was the felon that stole them, and may be thereupon justifiably arrested.". Lastly in discussing the execution of such warrants, he gives the following instructions. "If the door be shut, and upon demand it be refused to be opened *by them within*, if the stolen goods be in the house, the officer may break open the door, . . . (emphasis supplied)". The words "by them within" are most crucial, for it shows that Hale contemplated no execution of the warrant when no one was within. Also, the requirements of demand and refusal before forcible entry are the same as those applied by Hale to arrest warrants at 2 Hale, Pleas, supra 90-92.

These requirements were first put foreward in Semayne's Case, 77 Eng. Rep. R. 194 (K. B., reported by Coke 1604). As was pointed out by Judge Prettyman in *Accarino*, supra, 179 F. 2d at page 460, this case "which is usually cited as an authority upon this subject, really concerned a writ issued in a civil case, but the court discussed the rights of a sheriff, in cases when the King was a party, to break into a house either to arrest a felon "or to do other execution of the K.'s process".

The relevance of all this is that the demand and refusal concept and language first developed in contemplation of an arrest situation or a situation where there was an actual

party on the premises to refuse. There is no possibility of an ex parte execution of an arrest warrant, and there is no indication to be found that execution of search warrants except on occupied premises was either practiced or even contemplated, much less condoned, at common law. Indeed, Hale seems to have been the only commentator who even came close to separating the search warrant from the arrest warrant prior to 1766. Thus, as Judge Prettyman points out in *Accarino,* supra at 461, the previously mentioned mid-18th Century commentator Burn made the following statement concerning forced entry which was appended as a footnote to the first American Edition of Hale:

> "But the breaking an outer door is in general so violent, obnoxious and dangerous a proceeding that it should be adopted only in extreme cases where an immediate arrest is requisite.". 1 Burn, Justice of the Peace and Parish Officer, 87 (6th Ed. 1758).

Hawkins, in his 1716 work, uses Coke's language concerning a "search for felons or stolen goods" under his section on arrests. Although the sentence where he uses Coke's language appears to arrive at Hale's conclusions regarding the propriety of such warrants, this one short comment is Hawkins' only reference to the power to search. Hawkins, Pleas of the Crown, Book 2, Chap. 13. Further, Foster, in his work Crown Law, 1st Ed. 1762, includes extensive observations on the execution of arrests and arrest warrants, with the usual requirements of notification, demand and refusal, at 319 et seq. but does not even mention the power to search either as ancillary to the power to arrest or separate from it.

Lastly, Blackstone, in his great Commentaries, brought out between 1761 and 1769, does not mention a power to search at all.

However, apparently somewhere below the threshold of perception of the commentators, the power to search by official order was being extended by the British Government in the 18th Century, which circumstance was to play a large part in the coming of the American Revolution.

As Mr. Justice Bradley put it in his famous opinion in Boyd v. United States, supra, 116 U. S. at 625, 6 S. Ct. at 529:

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and

Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the North Briton, particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libelous. By authority of the secretary's warrant Wilkes' house was searched and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1000 against Wood, one of the party who made the search, and £4000 against Lord Halifax, the Secretary of State who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of Entick v. Carrington and Three Other King's Messengers. . . .".[2]

The decision in Entick v. Carrington would not be expected to throw light on our present subject, as it dealt with a warrant under which which [*sic*] Entick was arrested at

2. The dearth of cases attacking the general warrants which grew up in the first half of the 18th Century is surprising, but it must be remembered that illegality of seizure was not a ground to challenge competent evidence in a criminal trial at the time and as Lord Camden observed in Entick, "It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of a Secretary of State and the Solicitor of the Treasury, or such warrants could never have passed for lawful till this time." 95 Eng. Rep. R. 807 at 818. This might in somewise explain the silence of the commentators on the issues raised by these warrants also.

the house to be searched, and was present during the search. However, the face of the warrant was silent as to the method of execution, concerning which Lord Camden wrote:

> "The warrant in our case was an execution in the first instance, without any previous summons, examination, hearing the Plaintiff, or proof that he was the author of the supposed libels; a power claimed by no other magistrate whatever (Scroggs C. J. always excepted); it was left to the discretion of these defendants to execute the warrant in the absence or presence of the plaintiff, when he might have no witness present to see what they did; for they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed; there might be nobody to detect them.".

Entick v. Carrington, supra, at 817.

Thus it appears that not only was it not usual to execute a warrant authorizing a search if no one was on the premises, but Lord Camden viewed it as a violation of the common law to do so. This conclusion is further reinforced by the observation of Mr. Justice Brennan in Ker v. California, 374 U. S. 23, 52, 83 S. Ct. 1623, 1639, 10 L. Ed. 2d 726 (1963), regarding the general warrants of the Colonial period:

> "Service of the general warrants and writs of assistance was usually preceded at least by some form of notice or demand for admission.".

And in further clarification of the great weight to be accorded Entick v. Carrington, both as a statement of the common law and as an authority for the interpretation of the Fourth Amendment we quote Mr. Justice Bradley as follows:

"Lord Camden pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time."

"As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment.". *Boyd*, supra 116 U. S. at 626, 6 S. Ct. at 530.

The inevitable conclusion which we must reach from all of the above is that, as already stated, 18 U. S. C. § 3109, as a codification of the common law, does not apply to entries in the execution of a search warrant made with the knowledge that no one is home, and further that the principles of the common law in the minds of the framers when the Fourth Amendment to the Constitution was drafted renders such a procedure seriously suspect Constitutionally.

It is true that we are not absolutely bound to interpret the Fourth Amendment to mean exactly the same thing as the common law at the time of its enactment. In the words of Mr. Justice Marshall "we must never forget, that it is a Constitution which we are expounding.". McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. Ed. 579 (1819). The Fourth Amendment must be applied in the light of modern experience, which may lead us to conclude that some practices deemed reasonable in 1789 are not reasonable today, and vice versa. But the core values to be protected remain unchanged, and a court should be extremely cautious in excluding areas from the protection of the Amendment which the common law would have included. Even if we were dealing with an Act of Congress, we could not defer in the abrogation of a core value embodied in the Bill of Rights, and we must proceed with even greater caution here, where there is no legislative judgment authorizing the questioned activity.

It is true that the common law of the Colonial period, with its heavy emphasis on the prerogatives of real property ownership, would probably have denied the right to enter some empty premises to execute a search warrant, such as warehouses, etc., where modern judgment might not find such entry unreasonable under the particular circumstances of the case. But the most important area of common law concern remains a vital concern today. Entick v. Carrington involved a dwelling, and the dangers of abuse, were the authorities allowed to break into a home to search it after they had made sure it was empty, have changed little from Lord Camden's time. There is still the possibly unnecessary property damage in the broken lock and door. There is unfortunately still the possibility of pilferage by officers of the law. Most importantly, especially since the invention of the camera, there is the very real possibility

of a general search made under the guise of a legitimate one, undetectable because the evidence seized need not be physically carried away. We are better protected against the general search than were the Colonists before the decision in *Entick* (insofar as that decision was followed in the colonies), because of the necessity of probable cause for issuance of the warrant, and specificity in describing what may be seized. The protection of specificity might well prove illusory, however, were it to become common practice to execute warrants when nobody but the authorities was present.

The passage of 18 U. S. C. § 3103a marked the demise of the mere evidence rule. While no one really mourns the passing of the mere evidence rule, it is not as difficult as it formerly was to make out grounds for the issuance of a warrant, and the exact limits of those grounds under the Constitution are yet to be set. More easily obtained warrants coupled with their execution on unoccupied homes might lead to a *de facto* resurrection of the general warrant directed, not at specific property, but at the no-holds-barred incrimination of troublesome persons.[3] And even if none of the evils above described occur, the man returning to his home to find the door hanging on one hinge will always feel that they have all happened. There is a basic violation of our traditional sensibilities in such a secret and ex parte procedure taking place in a man's home, with him left to discover it for himself and imagine what he will about its true purpose and procedure afterwards. Security of the home was foremost in the minds of the Framers. We must

3. The dangers of such a practice become very concrete indeed when it is observed that even in this case, though the great bulk of the items seized were reasonably related to the description in the warrant, the agents could not resist the temptation to take defendant's personal telephone book, which was neither described in the warrant nor reasonably related to it.

remember in this regard that the Fourth Amendment not only speaks of unreasonable searches and seizures, but also of "The right of the people to be secure in their persons, *houses,* papers, and effects . . ." (emphasis supplied). Many if not most of us have in our homes something secret which we wish to remain secret, and which we think will injure or embarrass us if it becomes known. It may not be illegal. Our fears regarding the effects of disclosure may be groundless. But we still have the right not to come home to find our doors hanging open, and the agents of the state come and gone from their search of our home, never knowing for sure where they searched or what they found. A man's home is still more his castle than this.

The Court is mindful of a number of cases decided by American courts which appear to bear on the subject. The sole 19th Century case, Androscoggin R. R. Co. v. Richards, 41 Me. 233 (1856), decided, on what we regard as a misreading of Hale, supra, that a valid warrant protected an officer from an action in trespass when he broke into an occupied railroad depot to serve it.[4] But even at that, the opinion specifically excepts entry into home under such conditions from the scope of its ruling. The 20th Century cases, some eight in number are not compelling.[5]

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4. As set out above, it appears that Hale never contemplated such a situation. See the Court's discussion of *Hale* earlier in this Opinion.

5. Jones v. State, 4 Ala. App. 159, 58 So. 1011 (1912); United States v. Camarota et al., 287 F. 388 (S. D. Cal., 1922); Thigpen v. State, 299 P. 230 (Okla. Cr. Ct. of App. 1931); Collins v. State, 184 Tenn. 356, 199 S. W. 2d 96 (1947); Pennington v. State, 302 P. 2d 170 (Okla. Ct. Cr. App. 1956); People v. Johnson, 231 N. Y. S. 2d 689 (Ct. Gen. Sess., N. Y. Co. 1962); People v. Law, 55 Misc. 2d 1075, 287 N. Y. S. 2d 565 (1968); United States v. Hawkins, 243 F. Supp. 429 (E. D. Tenn. 1965). Two other cases sometimes cited as bearing on this subject, Goodman v. State, 178 Md. 1, 11 A. 2d 635 (S. Ct. Md. 1940) and United States v. Watson, 307

The first such case, Jones v. State, 4 Ala. App. 159, 58 So. 1011 (1912), decided the issue in one sentence, and none expended more than a very few paragraphs. More importantly, none faced squarely the Constitutional problems of such an entry. The entire jurisprudence of the 20th Century on the subject can be reduced to two propositions: First, that a person should not be able to prevent the execution of a search warrant by exiting surreptitiously as the authorities arrive; and second, that a person should not be able to defeat the execution of a search warrant by staying away from the premises to be searched. Whatever validity these propositions might have in other circumstances, we find them unpersuasive on the facts before the Court. To claim that a person will be able to defeat the process of the court by sneaking out is tenuous, since persons are not usually expecting the police, and most search parties have enough persons in them to cover all exits, which seems in the experience of the Court to be standard police practice. Second, in the case of a dwelling, the claim that a person can defeat the process of the Court by staying away also seems tenuous, especially where a person does not know he is under investigation.

These considerations hardly outweight the serious Constitutional problems set out above, and since we are not bound by these decisions, we note their existence but decline to follow them insofar as they would apply.

We note with satisfaction that the very fact that there are only a small number of cases on this question seems to indicate that searches of unoccupied homes never have been the rule in American jurisdictions, and are not today.

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5. (Cont'd.)
F. Supp. 173 (Dist. Ct. of D. C. 1969) are not apposite as they both involved searches of occupied premises, and the statements therein contained, while no more compelling than the statements in the other cases, are dicta.

Our decision in this case will not turn established police procedure upside down. However, the Constitution is not only to protect us from widespread abuses of the past and present, but those that might become widespread in the future also. We do not believe that there was any mischievous intent on the part of the officers who served the warrant in the present case, but Constitutional protections cannot be waived by the good intentions of the authorities. We cannot see how we could uphold the procedure in this case without affirming its propriety as standard procedure in all future cases. A man's home should not be forcibly entered in his absence to serve a search warrant, absent some exigent circumstance which it is up to the Government to show, especially in a case such as this where the house was under surveillance and the agents knew before going to the door that no one was home. No such exigent circumstances appear in the record. It appears that the defendant was a regularly employed person of fairly regular habits, and the agents' investigation should have revealed this. Defendant did not know he was under investigation or that a warrant had been issued. If the warrant was not served before night on March 23 there was every reason to expect it could be served the next morning. Further, the Court observes that a special exception to the rule that a day warrant may not be served in the night, allowing service upon the return of the occupant if the home was empty at sundown, makes much more sense in the protection of the values inherent in the Fourth Amendment than does any approval of the entry of a home when it is unoccupied.

Nor does the entry of the delicatessen proprietor onto the premises to be searched in response to the sound of the breaking door cure the unreasonableness of the manner of entry. This man was not a guest left in charge of

Gervato's home in his absence. There is no guarantee that such a person would have any interest in preventing the abuses we have alluded to. If the entry was unreasonable it cannot be afterwards cured by such a fortuitous arrival.

Miller v. United States, 357 U. S. 301, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958), held that the manner of entry into a home may render whatever comes after unreasonable no matter how reasonable it would have been but for the unreasonable entry, and further held that suppression of evidence seized after such an entry was the proper course to be followed. In that opinion the court observed, at 313, 78 S. Ct. at 1197,

> "We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of criminal law proves that tolerance of short cut methods in law enforcement impairs its enduring effectiveness.".

Later in the same paragraph, the Court speaks regarding § 3109 in language applicable to the present case also:

> "Congress, codifying a tradition embedded in Anglo-American law, has declared . . . the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.".

For the reasons set out above, the Court finds that the entry into defendant's unoccupied home on March 23, 1971, was unreasonable and unlawful and rendered the search and resulting seizures unreasonable in violation of the Fourth Amendment of the Constitution of the United States, and that therefore all evidence procured as a result of that unlawful entry, search and seizure must be and hereby is rendered inadmissible in any criminal proceeding against the defendant Frank Gervato.

One further issue must be dealt with. On April 2, the defendant went to the Philadelphia Regional Office of the BNDD, accompanied by counsel. He went at the request of the Bureau. While there he made an unsigned statement concerning the fruits of the search. Apparently both defendant and his counsel regarded the statement as exculpatory in the face of what the search had turned up. Defendant now attacks the admissibility of those statements.

The test as to whether evidence is the fruit of an illegal search is whether it "has been come at by exploitation of that illegality, or instead by means sufficiently distinguishable to be purged of the primary taint". Wong Sun v. United States, 371 U. S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963). In the latter regard the connection between the illegality and the evidence may "become so attenuated as to dissipate the taint". Id, at 491, 83 S. Ct. at 419, quoting Nardone v. United States, 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

The question is, are these statements the fruit of the illegal search, or were the effects of the search so purged and dissipated that the statements are not properly the result of them. We must conclude that the statements were the fruit of the illegal search on the strength of Harrison v. United States, 392 U. S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d

1047 (1968). The facts in *Harrison* were as follows: The authorities illegally obtained [*sic*] confession from Harrison. At Harrison's first trial, the trial court erroneously admitted the confession, and Harrison, with advice of counsel and time to reflect, took the stand in an attempt to explain away the confession. The testimony he gave in an attempt to exonerate himself turned out to be damning. Harrison was convicted, but granted a new trial on the basis of the trial court's error in admitting the illegally obtained confession. At the second trial, the confession was kept out but Harrison's testimony at the previous trial was admitted. In holding that this testimony was fruit of the poisonous tree, the Court said "The question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained . . . then his testimony was tainted by the same illegality.". It must be observed that in *Harrison* the defendant also had counsel. The presence of counsel in such a case as the case at bar does not render the statements any less the fruit of the illegal search, especially since even a good lawyer could not be sure that the evidence seized would be ultimately ruled inadmissible. The only thing in all the world that impelled the statements of defendant was the illegally seized evidence.

Perhaps passage of time can purge the undue coercive effects of an illegal arrest, see *Wong Sun*, supra, but it is difficult to see how it would dissipate the coercive effect of illegally seized tangible evidence. For these reasons the defendant's statements at the Philadelphia Regional Office of the Federal Bureau of Narcotics and Dangerous Drugs of April 2, 1971, must also be held inadmissible against him in any criminal proceeding.

On Motion for Reconsideration

The Government has filed a Motion for Reconsideration by the Court of its order suppressing evidence, raising a number of points. As far as the facts go, the Court is satisfied that the conclusions it reached were both proper and probable. However, some further observations are called for. The Fourth paragraph of the Government's Motion includes the following statement:

> "In addition thereto, the statement of the defendant's witness Mr. Sokol itself indicates that the agents were not sure whether Gervato was at home or not. We believe that the defendant should be bound by the testimony of his own witness.".

The testimony referred to is that from Page 107 of the transcript, where Mr. Sokol testified:

> "So I says, 'Why did you have to go through the door?' And I says to him, 'What is going on? Is Gervato home?'
>
> So he says, '*No,* we saw him—we think he run in here, that is why we had to break in fast.' " (emphasis supplied)

It will be noted that Mr. Sokol asked if Gervato was home, to which the Agent replied "No, we saw him . . ." and then said "we think he run in here, that is why we had to break in fast.". This is not necessarily a claim that the agents really thought Gervato was home. It can as easily be taken as a near admission of knowledge of Gervato's absence by the agents, followed by an attempt at excuse which was never even alleged at the hearing. It is not a statement clearly indicating that "the agents were not sure whether Gervato was home or not", and even if

they had unequivocally so stated to Mr. Sokol, Mr. Gervato could not possibly be bound to admit the truth of the agent's statement to Sokol simply because Sokol testified that the statements were made.

As to the allegation in Paragraph 5 of the Government's Motion that the principal of the Court's decision in this case would also deny the power of "law enforcement authorities to seize contraband goods where their very existence might be a danger to the community, as explosives", it is for future cases to decide what exigent circumstances are sufficiently pressing to justify a forcible entry of an unoccupied dwelling for the purposes of search and seizure on the particular facts then at issue. In this case there were no such exigent circumstances.

The Government's other contentions are without merit. The Motion for Reconsideration of Order Suppressing Evidence is denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1307

FRANK GERVATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a warrant to search a private dwelling may not be executed when the occupant is not at home, except when there are exigent circumstances to do so.

A two-count indictment was returned in the United States District Court for the Eastern District of Pennsylvania charging petitioner with illegally manufacturing lysergic acid amide, a depressant drug, in violation of former 21 U.S.C. 331(q)(1) and 360a(a) (now 21 U.S.C. 841(a)(1)), and with possessing that drug in violation of former 21 U.S.C. 331(q)(3)(B) and 360a(c)(2) (now 21 U.S.C. 844(a)). Petitioner filed a motion to suppress certain evidence seized from his apartment under a search warrant executed on March 24, 1971. Petitioner argued, *inter alia*, that the search

was illegal because neither he nor any "authorized person" was on the premises during the search. The district court granted the motion on this ground (Pet. App. A12-A33). On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals vacated the district court's order granting the motion to suppress and remanded the case for further consideration (Pet. App. A1-A11). Petitioner now seeks certiorari.

1. In the latter part of March 1971, agents of the Bureau of Narcotics and Dangerous Drugs learned that petitioner had purchased all the ingredients necessary to make dimethyltryptamine (DMT), a controlled drug (Tr. 6, 9-13, 16, 42, 48, 53-54, 102-103). On March 24, 1971, after petitioner had bought some dry ice, a coolant necessary for the manufacture of DMT (Tr. 11, 13, 48), BNDD agents began a surveillance between 12:00 and 1:00 p.m. of petitioner's apartment (Tr. 20, 45). At about 2:00 p.m. agent William Glanz obtained a warrant authorizing him to search petitioner's apartment in the daytime for dimethyltryptamine as well as chemicals and equipment used in manufacturing the drug (Tr. 18). At 5:30 p.m. Glanz and two chemists drove to petitioner's apartment. When they arrived, the surveilling agents told them that they did not think petitioner was inside the apartment (Tr. 20, 45). At about 6:00 p.m. Glanz knocked on the apartment door, located on the side of the building, then announced his official identity and his reason for wanting to enter the apartment. Receiving no reply, he knocked again. After a brief pause, during which he heard no response from inside the apartment, he forced open the door (Tr. 64). After entering, Glanz and the other agents[1] were met by the owner of

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[1] Six agents from the Bureau of Narcotics and Dangerous Drugs and one police officer executed the warrant; the two chemists were there as advisors (Tr. 62).

the building and two young men, who had entered through a door connecting the apartment with a delicatessen behind which the apartment was located (Tr. 22, 67). The building owner was present during the entire three-hour search which followed (Tr. 25). The agents initially searched the premises with flashlights, hoping that petitioner would return to the premises (Tr. 68-69). At 9:10 p.m., after the search was completed and seventy-eight items had been seized, petitioner arrived home (Tr. 28-33, 124).

Although the district court stated that it did "not believe that there was any mischievous intent on the part of the officers who served the warrant" (Pet. App. A28), it held that the warrant should not have been executed in petitioner's absence.[2] The court concluded that "[a] man's home should not be forcibly entered in his absence to serve a search warrant, absent some exigent circumstances which it is up to the Government to show, especially in a case such as this where the house was under surveillance and the agents knew before going to the door that no one was home" (Pet. App. A28).

2. In an opinion on which we rely here (Pet. App. A1-A11), the court of appeals properly rejected the ruling of the district court as a novel and unwarranted restriction on the use of search warrants. After examining the historical rationale behind the search and seizure provisions of the Fourth Amendment (Pet. App. A3-A6), the court concluded that the primary purpose of the Amendment is "to protect against warrantless searches

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[2] The district court assumed that "the warrant was valid and was validly executed as regards the time of day and the scope of the items seized" (Pet. App. A13).

and seizures and those conducted under an indiscriminate general authority. There is no indication that the Founding Fathers were also concerned that the power to search should be dependent on the presence of the occupant" (Pet. App. A7). The court observed further that neither this Court nor any appellate court has ever suggested that the occupant of the property searched must be present while a warrant is executed. As the court also noted (Pet. App. A7), there is no such mandatory requirement contained in Rule 41, Fed. R. Crim. P.; on the contrary, that Rule provides in part that an inventory "shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, *if they are present* * * *" (Rule 41(d); emphasis supplied). In rejecting the argument that the absence of the occupant substantially increases the possibility of a general search or pilferage, the court held that adequate protection against abuses is provided by the requirement for judicial supervision prior to issuance of the warrant (Rule 41(e)), restrictions on execution to certain civil officers (Rule 41(c) and 18 U.S.C. 3105), and the requirement of an inventory made in the presence of the occupant or in the presence of at least one credible person other than the applicant for the warrant (Rule 41(d)) (Pet. App. A9-A10). Finally, the court noted that the presence of the occupant at the commencement of a search of a house will not significantly deter pilferage or a general search if that is the intent of the agents (Pet. App. A10). In light of these considerations, the court of appeals correctly concluded that the search in question was valid under the Fourth Amendment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.